IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 658 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA

and

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

REVADAS HIRABHAI ROHIT

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 658 of 1992

MR G RAMAKRISHNAN for Petitioner No. 1

THROUGH JAIL for Petitioner No. 1

MR MA BUKHARI APP for Respondent No. 1

CORAM : MR.JUSTICE B.J.SHETHNA

and

MR.JUSTICE D.P.BUCH

Date of decision: 05/12/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE B.J.SHETHNA)

#. The appellant-accused-Revadas Hirabhai Rohit is son of accused No.2-Hira Nathabhai Rohit in Sessions Case No.99/91. Both the accused were tried for the offences under Sections 302, 324, 504 and 114 of IPC by the learned Additional Sessions Judge, Bharuch for committing murder of deceased Ambubhai, son of Karsanbhai on 3.2.1991 at about 8.30 p.m. at village Ranipura. However, after considering the prosecution evidence, the learned Judge by his judgment and order dated 9.7.1992 came to the conclusion that the prosecution has failed to prove its case against the accused No.2-Hirabhai Nathabhai Rohit for the offences for which he was charged, therefore, the learned Judge acquitted him for all the charges levelled against him. However, he found the prosecution evidence against the main accused No.1-Revadas Hirabhai Rohit trustworthy and reliable, therefore, by his impugned judgment convicted the appellant-accused for the offence under Section 302 IPC and sentenced him to suffer life imprisonment and to pay a fine of Rs.5000/= in default to undergo further rigorous imprisonment for one year. It is further ordered that on realisation of amount of fine the whole amount be paid to the witnesses Dariyaben, wife of Ambubhai Karsanbhai. This order of conviction and sentence has been challenged by the appellant-accused by way of this appeal which is filed through jail. Mr.Ramakrishnan, learned counsel is appointed to defend the appellant-accused in this case. We have heard both Shri Ramakrishnan for the appellant-accused and learned APP Mr.Bukhari for respondent-State.

#. It is the prosecution case that on 3.2.1991 at about 8.30 p.m. at village Ranipura both the accused Revadas (present appellant) and Hirabhai who are son and father respectively had common intention to kill Ambubhai, son of Karsanbhai-complainant. Present appellant-Revadas caused injury by spear on the stomach of Ambubhai which proved to be vital thereby he committed an offence under Section 302 IPC whereas, the accused No.2-Hirabhai committed offence under Section 302 read with Section 34 IPC. In the alternative, the accused No.2 was charged for abetting accused No.1 to commit murder of deceased-Ambubhai. The incident in question took place in the night of 3.2.1991 at about 8.30 p.m. and within two hours of incident complainant-Karsanbhai Nathabhai PW-1 Ex.12 lodged the complaint against both the accused

for committing murder of his son deceased-Ambubhai.

#. To prove its case the prosecution has mainly relied upon the evidence of complainant-Karsanbhai Nathabhai PW-1 Ex.12, who had witnessed the incident. Another eye witness was Rasikbhai Vasava PW-2 Ex.13, who coincidently was there to call the deceased-Ambubhai for labour work on the next day. Other witnesses are Dariyaben Kalidas, widow of deceased Ambubhai PW-3 Ex.14 and Dr.Jitendra Rathod PW-6 Ex.22 who had performed the postmortem and prepared the postmortem note at Ex.23. Dalpatbhai was examined at PW-4 Ex.16 for the panchnama of seen of offence at Ex.17. Map is at Ex.11. The learned Judge found the evidence of both the eye witnesses-Karsanbhai Nathabhai-complainant as well as Rasikbhai reliable, therefore, convicted the accused No.1-Revadas for the offence under Section 302 IPC.

#. Learned counsel Shri Ramakrishnan for the appellant-accused vehemently submitted that the learned Judge committed grave error in placing reliance upon the evidence of the complainant-Karsanbhai Nathabhai who was most interested witness in this case. He submitted that the deceased-Ambubhai was the real son of complainant-Karsanbhai and another eye witness-Rasikbhai Vasava was merely a chance witness and his evidence should not have been relied upon by the learned Judge. He also submitted that admittedly Karsanbhai and his deceased son Ambubhai had strange relation with both the accused, who were son and father. They were not on talking terms and in fact just a day before the incident there was some exchange of words with deceased as well as both the accused. Therefore, he submitted that in such type of cases the court should be more careful in relying upon the interested testimony of the complainant-Karsanbhai. He has also submitted that as per the FIR at Ex.20 the appellant-accused-Revabhai came all of a sudden with spear and gave blow on the stomach of deceased-Ambubhai but after receipt of the postmortem report he changed his version before the court and stated in his chief examination that accused Revadas gave spear blow on the left chest of deceased-Ambubhai. He also submitted that though further statement of complainant-Karsanbhai was recorded by the police he refused to admit that his further statement was recorded by the police wherein he had stated that the incident took place in the late night. It is true that as per the evidence of Investigation Officer Shri Dalpatbhai Vankar Ex.24 police had recorded further statement of complainant-Karsanbhai but unfortunately no further question was put to him in his cross-examination about

the statement made by complainant in his further statement that the incident took place in late night and not at 8.30 p.m. In that view of the matter no importance can be attached to the statement made by complainant-Karsanbhai that his further statement was not recorded by police. The fact is that FIR was recorded at 10.30 p.m. rules out the possibility of incident taking place in the late mid night. In fact, another eye witness-Rasikbhai had received the injury with spear when he tried to intervene at the time of assault. He had gone along with police with Yadi before the doctor at 11.45 p.m. This also rules out the case that incident must not have happened at 8.30 p.m. as alleged by complainant-Karasnbhai and it must have taken place late mid night somewhere else.

#. We are also conscious of the fact that Karsanbhai Nathabhai-complainant is the most interested witness because he lost his real son. We are also conscious that though the accused No.1 is the real nephew of the complainant and accused No.2 was his real younger brother and that admittedly there was enmity between them since long therefore, we have to be more careful in examining witnesses of complainant-karsanbhai. It is true that Karsanbhai has changed his version. His earlier version before the police narrated in FIR that accused-Revadas gave blow with spear on the stomach of deceased-Ambubhai and stated before the court that accused-Revadas gave spear blow on the left chest of deceased-Ambubhai. However, considering the postmortem notes and the place on which deceased-Ambubhai has received injury it cannot be said to be a material contradiction which goes to the root of the matter. After all complainant-Karsanbhai is a rustic villager. He is an Adivasi and he may not be able to make clear distinction between chest portion and stomach portion. If otherwise his evidence is reliable then there is no reason to discard his oral testimony only on this ground.

#. It may be stated that the evidence of complainant-Karsanbhai is duly corroborated by Rasikbhai who happened to be there at the time of incident because he had gone there to call Ambubhai for labour work on the next day. He cannot be said to be chance witness because Rasikbhai himself received injury with spear on his hand when he tried to intervene for which he had immediately gone to the doctor along with police Yadi. Thus, we are of the considered opinion that the prosecution had proved its case against the present appellant-accused beyond reasonable doubt that because of the injury caused to him with deadly weapon like spear the deceased-Ambubhai died

on the spot.

#. However, this brings us to the question as to what offence is committed by the appellant-accused. It it an offence under Section 302 or a lesser offence like Section 304 Part-I IPC. It is clear from the evidence of both the prosecution witness-Karsanbhai and Rasikbhai that the quarrel started at the instance of deceased-Ambubhai who abused his uncle-Hirabhai on the previous night and the quarrel continued for about 10-15 minutes, therefore, we are not prepared to accept the evidence of both the witnesses i.e. Karsanbhai and Rasikbhai that at that time accused-Revadas came all of a sudden with spear and gave blow to the deceased because of which he died. In fact, there were as many as four injuries received by deceased-Ambubhai which is clear from postmortem notes where both the witnesses have not explained three other injuries received by deceased-Ambubhai. Thus, the prosecution is not coming forward with a true and real version that what actually had happened at the time of incident. On the basis of the evidence and circumstance we can safely come to the conclusion that because of the grave and sudden provocation present appellant-accused must have given spear blow on the vital part of the deceased because of which he died but for which he cannot be convicted for the major offence under Section 302 IPC. He can only be convicted for the lesser offence under Section 304 Part-I.

#. This brings us to the question regarding sentence that what sentence should be imposed against the appellant accused for the offence under Section 304 Part-I IPC. Mr.Bukhari, learned APP has produced the jail record of the appellant accused and as per the said jail record the appellant accused has actually undergone sentence of more than 9 years. Therefore, we are of the considered opinion that the sentence as already undergone would be sufficient.

#. In view of the above discussion, this appeal is partly allowed. The impugned order of conviction passed by the learned Additional Sessions Judge, Bharuch in Sessions Case No.99/91 convicting the appellant-accused for the offence under Section 302 IPC is modified and he is convicted for the offence under Section 304 Part-I IPC. He has by now undergone sentence for more than 9 years, therefore, on facts and circumstances of the case we are of the considered opinion that the sentence as already gone would be just and proper. Accordingly, we pass the order of sentence as sentence is already

undergone. The learned Judge has ordered the fine to be paid to Dariyaben, wife of deceased Ambubhai, but we set aside the order of fine, because we have already set aside the order of conviction and sentence for the offence under Section 302 IPC, therefore, the order of fine is required to be set aside. Accordingly, the fine if paid be also refunded to the appellant-accused and he may be set at liberty, if not required in any other case.

(B.J.Shethna, J.)

(D.P.Buch, J.)

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